States Court of Appeals for the First Circuit, C.A. Jt. App. 1300, which affirmed the district court's decisions on both claims. 407 F.3d at 21. The other plaintiffs did not appeal.

The circuit court held that Hadfield's procedural due process claim was barred by the *Parratt-Hudson* doctrine, and, accordingly, did "not decide Hadfield's proper employment classification under Massachusetts law." 407 F.3d at 19.[12] Instead, it assumed, *arguendo*, that Hadfield had a property interest in continued employment under Massachusetts G.L. c. 35, § 51. *Id.*

The circuit court summarized the holdings of this Court in *Parratt* v. *Taylor*, 451 U.S. 527 (1981) and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), stating that the *Parratt-Hudson* doctrine,

> shields a public entity from a federal due process claim where the denial of process was caused by the random and unauthorized conduct of government officials and where the state has provided adequate post-deprivation remedies to correct the officials' random and unauthorized acts.

407 F.3d at 19-20.

> Our cases establish that a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law. [Citations omitted.] In other words, *conduct is "random and unauthorized"*

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[12] Sheriff McDonough and the commissioners contended below that Hadfield was an at will employee covered by Massachusetts G.L. c. 126, § 8A, and therefore did not have G.L. c. 35, § 51 rights to termination for cause and a pre-termination hearing. *See Looney* v. *Flynn*, 1990 WL 252170 (D. Mass. December 21, 1990) (An Assistant Deputy Superintendent in a Massachusetts county sheriff's department serves "at the Sheriff's pleasure" under Massachusetts G.L. c. 126, § 8A.)

> *within the meaning of Parratt-Hudson when the challenged state action is a flaw in the official's conduct rather than a flaw in the state law itself.* [Footnote omitted.]

Id. (Emphasis added.) The court restated what it had said in *Herwins* v. *City of Revere*, 168 F.3d 15, 19 (1st Cir. 1998), that "but for" the *Parratt-Hudson* doctrine,

> "federal suits might be brought for countless local mistakes by officials in administering the endless array of state laws and local ordinances."

Id.

The circuit court distinguished *Zinermon* v. *Burch*, 494 U.S. 113, 136-138 (1990), finding that, unlike the Florida officials in *Zinermon*, Sheriff McDonough had no "state sanctioned discretion" whether to grant Hadfield a pre-termination hearing. The circuit court said,

> Hadfield was denied a hearing because *the due process defendants erred (if they erred at all) by misapplying Massachusetts civil service law. This determination was not discretionary or governed by a formal or informal policy.* [Footnote omitted.] *Cf. Zinermon* v. *Burch*, 494 U.S. 113, 136-138 (1990) (holding that the *Parratt-Hudson* doctrine does not apply where the denial of predeprivation process resulted from the state-sanctioned discretion of the official to decide what process is necessary). . . . *Rather, if error, it was simply a misapprehension of state law. This is the sort of random and unauthorized conduct to which Parratt-Hudson applies.* . . .

407 F.3d at 20. (Emphasis added.)

Because Massachusetts G.L. c. 35, § 51 provides a "sufficient postdeprivation remedy," the circuit court held that the district court's entry of summary judgment

against Hadfield and in favor of respondents on Hadfield's procedural due process claim was correct. 407 F.3d at 21.

REASONS FOR DENYING THE WRIT

Petitioner Hadfield claims that the circuit court's application of the *Parratt-Hudson* doctrine to dismiss his § 1983 procedural due process claim is at odds with this Court's rulings in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985) and *Zinermon*, which he claims is "indistinguishable" from the present case. In addition, Hadfield argues that this Court should grant certiorari in order to resolve a split among the circuits in the way they apply the *Parratt-Hudson* doctrine. He also argues that the post-termination remedy under Massachusetts G.L. c. 35, § 51 is not adequate.

This Court should deny the Writ because the First Circuit's application of the *Parratt-Hudson* doctrine in this case is entirely consistent with this Court's precedent and there is no split of authority among the circuits regarding any issue *relevant* to the application of the *Parratt-Hudson* doctrine to this case. Moreover, Massachusetts G.L. c. 35, § 51 provides an adequate post-termination remedy.

1. The circuit court's application of *Parratt-Hudson* in this case is consistent with this Court's precedent.

1.1 This Court's decisions in *Parratt*, *Logan*, *Hudson*, *Loudermill* and *Zinermon*.

Procedural due process *usually* requires that a public employee, dismissible only for cause, be given some kind of pre-termination hearing. *Gilbert* v. *Homar*, 520 U.S. 924, 929

(1997); *Loudermill*, 470 U.S. at 542. There is no disagreement on this point. Although respondents maintain that Hadfield was an at will employee of Sheriff McDonough under Massachusetts G.L. c. 126, § 8A and had no property interest in continuing his employment as ADS-Training, they acknowledge that if Hadfield were subject instead to Massachusetts G.L. c. 35, § 51, Sheriff McDonough violated that statute by terminating him without a prior hearing.

This Court has recognized that while substantive due process violations occur at the time of the deprivation, procedural due process violations are not complete at the time of the deprivation, but only when the state fails to provide due process (because it is the lack of appropriate process, not the deprivation which is unconstitutional). *Zinermon*, 494 U.S. at 125-26. The critical inquiry is what process the state provided and whether it was adequate. *Id.*

In determining what process is due, a court must weigh several factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest. . . .

Zinermon, 494 U.S. at 127, quoting *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

In *Loudermill*, the Court applied this balancing test to a claim that a school district violated its employees' procedural due process rights when it terminated their employment without a prior hearing. Although the terminated employees had a statutory right to appeal the termination, the statute made no provision for a pre-termination hearing. Concluding that due process normally requires at least a minimal

pre-deprivation hearing, this Court held that the terminated employees had stated a due process claim.

Like *Loudermill*, this Court's decisions in *Parratt*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), *Hudson* and *Zinermon* all apply the factors outlined in *Matthews* to determine what procedural protections are constitutionally required. In *Zinermon*, this Court stated:

> . . . *Parratt* is not an exception to the *Matthews* balancing test, but rather an application of that test to the unusual case in which one of the variables in the *Matthews* equation – the value of predeprivation safeguards – is negligible in preventing the kind of deprivation at issue.

Id. at 128-29.

Under the *Parratt-Hudson* doctrine, when circumstances are such that is impossible or impractical for the state to provide pre-deprivation process, then no such process is required, and due process is satisfied if the state provides an adequate post-deprivation remedy. The *Parratt-Hudson* doctrine embodies important concepts of federalism and protects the federal courts from being swamped with lawsuits better resolved in state courts.[14]

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[14] "The commonsense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. As we explained in *Parratt*, the contrary approach 'would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983 . . . [].' . . . The *Parratt* principle respects the delicate balance between state and federal courts. . . ." *Albright* v. *Oliver*, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring), quoting *Parratt*, 451 U.S. at 531-532.

In *Parratt*, a state prisoner brought a § 1983 action because prison employees negligently had lost materials he had ordered by mail. While recognizing that a predeprivation hearing usually is required, this Court stressed the special situation in *Parratt*, noting that the loss was not due to "some established state procedure and the state cannot predict precisely when the loss will occur. It is difficult to conceive of how the state could provide a meaningful hearing before the deprivation takes place." 451 U.S. at 541. In *Parratt* the Court pointed out that the deprivation in that case,

> occurred as a *result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate* nor is there any contention that is was practicable for the State to provide a predeprivation hearing.

Id. at 543. (Emphasis added.)

In *Logan*, an employee filed a claim with the Illinois Fair Employment Practices Commission but the Commission, through inadvertence, failed to commence a fact finding conference within 120 days as required by statute and thereby lost jurisdiction to hear the case. The employee claimed that the state's established procedure, which divested the Commission of jurisdiction to hear the claim, violated his procedural due process rights. This Court agreed, holding that *Parratt* did not apply because the employee was challenging not the random and unauthorized conduct of a state employee but the established state procedure itself.

In *Hudson*, the Court extended the reasoning of *Parratt* to intentional deprivations of property, explaining that "[t]he state can no more anticipate the random and

unauthorized intentional conduct of its employees than it can similar negligent conduct." 468 U.S. at 533.

Zinermon, on which Hadfield relies, is fully consistent with *Parratt*, *Logan* and *Hudson*, but involved circumstances that rendered the *Parratt-Hudson* doctrine inapplicable. In *Zinermon*, Burch had been admitted to a psychiatric institution as a "voluntary" patient but alleged that hospital staff had failed to obtain his informed consent and therefore, wrongfully had deprived him of his liberty. The defendants claimed that the *Parratt-Hudson* doctrine applied, but this Court disagreed, stressing the distinction made in prior cases between losses caused by random and unauthorized conduct (to which *Parratt-Hudson* applied) and losses resulting from established state procedure (for which a § 1983 claim could be brought). 494 U.S. at 130. Applying that distinction, the Court concluded that the loss suffered by Burch resulted because Florida's statutes delegated broad power to hospital staff to admit psychiatric patients (depriving them of their liberty), but failed to circumscribe that power by requiring that a member of the staff determine whether the prospective voluntary admittee was mentally fit to give informed consent to a voluntary admission:

> The Florida statutes, of course, do not allow incompetent persons to be admitted as "voluntary" patients. But the statutes do not direct any member of the facility staff to determine whether a person is competent to give consent, nor to initiate the involuntary placement procedure for every incompetent patient. . . .
>
> Florida chose to delegate to petitioners a broad power to admit patients to FSH, i.e., to effect what, in the absence of informed consent, is a substantial deprivation of liberty. . . .
>
> * * *

> *Burch is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.*

Id. at 135. (Emphasis added.)

The Court in *Zinermon* distinguished *Parratt* and *Hudson* in three ways. First, due to the special nature of mental illness, it was foreseeable that under Florida's statutory scheme, which did not require a procedure to determine the competency of a patient before their voluntary admission, a patient seeking treatment for mental illness might not be competent and might be admitted despite a lack of informed consent. Moreover, the state could predict precisely when that deprivation of liberty would occur. In contrast, the Court noted that while the state in *Parratt* and *Hudson* might anticipate that on occasion a prison employee negligently or intentionally would lose or destroy an inmate's property, the state could not predict when those deprivations would occur. *Id.* at 136.

Second, the Court in *Zinermon* concluded that, unlike in *Parratt* and *Hudson*, pre-deprivation process was possible and would have been of value in avoiding the deprivation complained of. The Court noted that *Zinermon* was not a case like *Hudson* in which the employee was "bent upon effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards." *Id.* at 137. Had the state in *Zinermon* established procedures for obtaining informed consent, there was no reason to believe that the staff would not have followed those rules.

Finally, in *Zinermon*, the Court said that the conduct of the hospital staff in that case was not "unauthorized" within the meaning of *Parratt* and *Hudson*. Instead, the Court noted that the hospital staff had been delegated

broad discretionary authority that had not been delegated to the prison employees in *Parratt* or *Hudson*. The deprivation in *Zinermon*, the Court said, was "'unauthorized' only in the sense that it was not an act sanctioned by state law." *Id.* at 137-38.

1.2 The circuit court's reliance on the *Parratt-Hudson* doctrine was correct.

In the present case, the circuit court properly applied the *Parratt-Hudson* doctrine to bar Hadfield's § 1983 procedural due process claim and in doing so was consistent with this Court's prior rulings.

Loudermill did not displace or limit application of the *Parratt-Hudson* doctrine in appropriate cases and is not controlling in the present case. *Loudermill* merely stated a general rule based on the *Matthews* balancing test and recognized the need for the state to provide pre-deprivation process because it was practicable and would have had significant value in preventing the deprivation. The *Parratt-Hudson* doctrine also is based upon a *Matthews* balancing test, only it applies to situations where, because the state actor's conduct is random and unauthorized and thus unforeseeable, predeprivation process is impracticable and would have no value in preventing the deprivation.

All of the cases discussed above recognize the distinction between losses caused by established state procedures and losses resulting from random and unauthorized conduct in violation of established rules. In *Logan* and *Zinermon*, the *Parratt-Hudson* doctrine did not apply because the losses resulted from flaws in the procedures while in *Parratt* and *Hudson* the claims were that employees had acted in violation of rules that, if followed, would have been sufficient. The present case strongly resembles *Hudson* in that Hadfield

alleges that Sheriff McDonough, for purposes of political retribution, intentionally disregarded the pre-termination hearing required by Massachusetts G.L. c. 35, § 51, which Hadfield claims governed his employment status. According to Hadfield, the deprivation resulted not from any flaw in the state's established pre-termination procedures, but from Sheriff McDonough's violation of them.

Loudermill properly is distinguishable from the present case, as are *Logan* and *Zinermon*, because the claimed deprivations resulted from a flaw in established state procedures, not from a violation of them. In *Loudermill*, the state procedures made no provision at all for predeprivation process. Massachusetts G.L. c. 35, § 51 requires a pre-termination hearing, the very protection to which Hadfield claims to be entitled.

Nor does *Zinermon* render *Parratt-Hudson* inapplicable to Hadfield's claim. The deprivation in *Zinermon* resulted from a flaw in state procedure and the Court assumed that had the procedures been adequate, the hospital officials would have followed them and the deprivation would not have occurred. In the present case, Hadfield alleges that Sheriff McDonough was bent upon political retribution and intentionally violated predeprivation procedures which themselves were adequate.

In addition, none of the three factors relied upon by the Court in *Zinermon* to distinguish *Parratt* and *Hudson* exist in the present case. First, unlike the deprivation in *Zinermon*, the conduct at issue in this case was *not* predictable and could not have been foreseen by the state. In *Zinermon*, it was foreseeable under Florida's statutory scheme, which did not require determination of competency before voluntary admissions, that a patient seeking treatment for mental illness might not be competent yet might still be

admitted despite a lack of informed consent. In the present case, the Commonwealth of Massachusetts had no reason to expect that Sheriff McDonough would violate a state law that required a pre-deprivation hearing; nor could it predict when such a deprivation would occur. In that respect, this case is on all fours with *Hudson*.

Indeed, a state employee's acts must be considered random and unauthorized when they effect a deprivation by violating, rather than conforming to, established, non-discretionary procedures designed to protect an individual's constitutional rights.[16]

The second *Zinermon* factor, that pre-deprivation process was possible and would have been of value in avoiding the deprivation, also is absent in the present case. Pre-deprivation process was not possible precisely because the alleged conduct of Sheriff McDonough was unforeseeable and in violation of established procedures. As this Court made clear in *Hudson*, and again in *Zinermon*, the mere fact that the particular employee whose intentional conduct causes the deprivation can foresee his or her own conduct is immaterial. It is the state that must be in a position to foresee the deprivation. *Hudson*, 468 U.S. at 533-34; *Zinermon*, 494 U.S. at 137.

More fundamentally, because Hadfield alleges that Sheriff McDonough deprived him of pre-deprivation

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[16] *Abdullah* v. *Kennet*, 104 Fed. Appx. 750, 2004 WL 1575064, *1 (1st Cir. July 15, 2004) (unpublished opinion; *Mard* v. *Town of Amherst*, 350 F.3d 184, 193-94 (1st Cir. 2003); *Veterans Legal Defense Fund* v. *Schwartz*, 330 F.3d 937, 940 (7th Cir. 2003); *O'Neill* v. *Baker*, 210 F.3d 41, 49-50 (1st Cir. 2000); *Johnson* v. *Louisiana Dept. of Agriculture*, 18 F.3d 318, 322 (5th Cir. 1994); *Lowe*, 959 F.2d at 343; *Easter House* v. *Felder*, 910 F.2d 1387 (7th Cir. 1990) (*en banc*); *Katz* v. *Klehammer*, 902 F.2d 204, 206-07 (2d Cir. 1990); *Weimer* v. *Amen*, 870 F.2d 1400, 1405 (8th Cir. 1989).

process in violation of state law intentionally and in order to exact political retribution, this case is like *Hudson* in which the prison employee was pursuing a personal vendetta against the inmate whose property he destroyed. In such circumstances, no additional state procedural safeguards could have prevented the deprivation. The present case is very different from *Zinermon*, where this Court assumed that, had the state required appropriate procedures, they would have been followed by the hospital staff and prevented the deprivation. The *Matthews* balance favors application of the *Parratt-Hudson* doctrine in this case because additional or improved procedures would have been of no value, if, as alleged by Hadfield, Sheriff McDonough intentionally violated the existing procedures.

Finally, Sheriff McDonough's alleged conduct in this case was "unauthorized" as that term is used in *Parratt*, *Hudson* and *Zinermon*. In *Zinermon*, the state "broadly delegated, uncircumscribed power" to the hospital staff to admit psychiatric patients, thereby depriving them of their liberty, but it had provided no requirement that a prospective voluntary admittee be evaluated for competency to give informed consent to admission, and did not specify any procedure by which that was to be done. Thus, the state delegated to the hospital staff the state's duty to provide procedures to prevent the very type of deprivation that ultimately occurred. The Court held in *Zinermon* that the state could not use *Parratt-Hudson* to avoid liability if, under those circumstances, the staff failed to properly exercise their broad delegated authority.

The present case bears no resemblance to *Zinermon*. Here, Sheriff McDonough was delegated *no* authority or discretion whatsoever as to when or whether to afford employees entitled to the protection of G.L. c. 35, § 51 a

pre-termination hearing. State law required a pre-termination hearing and left nothing to Sheriff McDonough's discretion.

Relying on the statement in *Zinermon* that the deprivation in *Zinermon* was "'unauthorized' only in the sense that it was not an act sanctioned by state law," 494 U.S. at 137-38, Hadfield argues that Sheriff McDonough's conduct was not "unauthorized" simply because it violated mandatory, non-discretionary state procedures. However, Hadfield ignores a crucial difference between *Zinermon* and the present case. In *Zinermon*, the conduct was "unauthorized" only because it had not been affirmatively sanctioned under state law. The state's procedures were inadequate precisely because they failed to require evaluation for informed consent and left the issue entirely to the discretion of the hospital staff. In contrast, the alleged conduct of Sheriff McDonough in the present case was *prohibited* by state law. While conduct not explicitly permitted may not be "unauthorized" for purposes of *Parratt-Hudson*, as interpreted in *Zinermon*, conduct in violation of mandatory state law clearly is unauthorized.

The circuit court, therefore, properly relied upon the *Parratt-Hudson* doctrine in dismissing Hadfield's procedural due process claim.

2. There is no split among the circuits regarding any issue relevant to the application of the *Parratt-Hudson* doctrine to this case.

Hadfield claims that there is a split of authority among the circuit courts as to "the breadth of the *Parratt-Hudson* doctrine in general and its application to denial of pre-deprivation hearings in the employment context in particular." Petition at 6. Specifically, he claims that the

circuits disagree as to whether the termination of a tenured government employee without an adequate pre-termination hearing gives rise to a § 1983 procedural due process claim where the official responsible for the termination violated established procedure and state law provides an adequate post-deprivation remedy. Hadfield asserts that while the First and Seventh Circuits apply *Parratt-Hudson* to bar due process claims in such cases, the Second, Fourth, Fifth and Ninth Circuits have decided that *Parratt-Hudson* does not apply.

As set forth in the following four subsections, there is no split of authority on this issue. In arguing that the circuits are diverging, Hadfield misapplies the law and fails to refer the Court to recent decisions in each of the circuits involved that undermine his contention.

At the outset, there is no justification for Hadfield's apparent position that due process claims arising from employment decision are *sui generis*, at least in determining whether conduct is random and unauthorized. Whether conduct is random and unauthorized depends on the relationship between the conduct and the applicable state law and on the extent of discretion, if any, delegated by the state to the actor. The same analysis applies to employment related conduct as to any other procedural due process case.

2.1 The Fifth Circuit.

Hadfield cites a single Fifth Circuit case, *Findeisen* v. *North East Independent School District*, 749 F.2d 234 (5th Cir. 1984), decided more than 20 years ago, while he ignores multiple Fifth Circuit cases since that time that show clearly that the Fifth Circuit agrees with the First, Seventh and other circuit courts that conduct by an official

in violation of established state procedures is random and unauthorized, thus triggering application of *Parratt-Hudson* if an adequate post deprivation remedy exists. For example, in *Johnson* v. *Louisiana Dept. of Agriculture*, 18 F.3d 318 (5th Cir. 1994), decided ten years after *Findeisen*, the Fifth Circuit stated:

> § 1983 should not be employed to remedy deprivations which occur at the hands of even high ranking state employees "*who [are] acting in direct contravention of the state's established policies and procedures which have been designed to guarantee the very protections which the employee now has chosen to ignore.*" . . . Simply because Odom is a high state official does not mean that his actions are automatically considered established state procedure that would take the case outside of the *Parratt/Hudson* doctrine.

Id. at 322. (Emphasis added.)[18]

In sum, the Fifth Circuit applies the same law as the First Circuit did in the present case.

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[18] In *Charbonnet* v. *Lee*, 951 F.2d 638 (5th Cir. 1992), the court held that the conduct of a police officer in failing to remain neutral in a civil dispute, in violation of applicable police regulations, was random and unauthorized, stressing that "any harm to the plaintiff came not from a lack of foreseeably necessary safeguards but from a violation of controlling state regulations." *Id.* at 643. The court noted further that, "if the official is found to have violated [established state] procedure (and there is an adequate remedy under state law), then he is usually protected in his individual capacity by the *Parratt-Hudson* doctrine." *Id.* at 645. *See also Meyers* v. *Klevenhagen*, 97 F.3d 91, 95 (5th Cir. 1996); *Cathey* v. *Guenther*, 47 F.3d 162, 164 (5th Cir. 1995); and *Caine* v. *Hardy*, 943 F.2d 1406, 1413-14 (5th Cir. 1991) (distinguishing *Zinermon* on basis that while the conduct in *Zinermon* was an abuse of judgment, the exercise of that judgment was condoned by state regulations while in *Caine*, the conduct at issue, was an "intentional violation[] of controlling state regulations").

2.2 The Second Circuit.

Hadfield contends that there is split of authority between the First and Second Circuits regarding application of *Parratt-Hudson*, citing *Dwyer* v. *Regan*, 777 F.2d 825 (1985) to support his argument. *Dwyer* recognizes a special exception to the *Parratt-Hudson* doctrine and holds that conduct that otherwise could be considered random and unauthorized, including conduct in violation of established state law, is not random and unauthorized if the actor is a "high-ranking official having final authority over the decision-making process." *Id.* at 832. Notably, the Second Circuit continues to apply *Parratt-Hudson* where the exception set forth in *Dwyer* is not applicable.[17]

However, Sheriff McDonough is not a high-ranking official within the meaning of *Dwyer*. Courts in the Second Circuit equate a high-ranking official for *Parratt-Hudson* purposes with a final policymaker under *Monell* v. *Dept. of Social Services*, 436 U.S. 658 (1978).[18] Sheriff McDonough

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[17] In *Hellenic American Neighborhood Action Committee* v. *City of New York*, 101 F.3d 877 (1996), a case *decided 12 years after Dwyer*, the Second Circuit applied *Parratt-Hudson* to a city contractor's claim that its due process rights had been violated when a city official "de facto" barred it from city procurements, stressing that the contractor, "makes no claim that the due process violation was caused by an established state procedure. . . . To the contrary, [the contractor] argues that state officials acted in flagrant violation of the City Charter and the PPB rules." *Id.* at 881. *See also Katz* v. *Klehammer*, 902 F.2d 204, 206-07 (2d Cir. 1990) (applying *Parratt-Hudson* because conduct complained of was violation of state law rather than pursuant to established procedures).

[18] *Smith* v. *City of New York*, 2005 WL 1026551, *8 (S.D.N.Y. May 3, 2005); *Verri* v. *Nanna*, 972 F.Supp. 773, 793-94 (S.D.N.Y. 1997) (citing *Sullivan* v. *Town of Salem*, 805 F.2d 81, 86 (2d Cir. 1986) for the proposition that "question of policymaker status for the purposes of municipal liability under § 1983 is helpful for the purpose of 'random and unauthorized' inquiry under due process analysis"); *Krmencik* v. *Town of Plattekill*, 1989 WL 114307, *4 (N.D.N.Y. August 25, 1989).

is not a final policymaker for municipal liability purposes with respect to employment-personnel decisions within the meaning of *Monell*. His hiring and firing decisions are constrained by state law such as Massachusetts G.L. c. 35, § 51 and county policies not of his own making. Moreover, under that statute, his decisions are subject to review and reversal by the respondent commissioners.[19] Even if Sheriff McDonough exercised discretion as to hiring and firing, and even if he had abused that discretion, he did not make county policy with regard to employment matters. *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 (1988).

The status of a county sheriff was specifically discussed by this Court in *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986):

> Thus, for example, *the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy*. . . . Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. *This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board.*

[19] There is no evidence in the record that the respondent commissioners participated in Sheriff McDonough's termination of Hadfield's employment without a pre-termination hearing. The commissioners determined only that they were without jurisdiction to hear Hadfield's claim on the grounds that Massachusetts G.L. c. 35, § 51 did not apply and that Hadfield was an at will employee of the Sheriff under G.L. c. 126, § 8A. *See* note 9, *supra*.

Id. at 483 n. 12. (Emphasis added.) Indeed, in *Jeffes* v. *Barnes*, 208 F.3d 49, 60-61 (2d Cir. 2000), the Court of Appeals for the Second Circuit, while holding that a sheriff was a policymaker on other issues, made clear that a sheriff is *not* a policymaker on employment-personnel matters.[20]

Sheriff McDonough, when engaged in employment-personnel matters, as in the present case, is not a "high-ranking official" for purposes of the Second Circuit's special exception to *Parratt-Hudson*. Since the Second Circuit's high-ranking official exception does not apply to the present case, and the Second Circuit otherwise applies *Parratt-Hudson* in the same manner as the First Circuit when a violation of state law is involved, there is no split of authority between the Second and First Circuits.

2.3 The Ninth Circuit.

Citing to the Ninth Circuit's decision in *Honey* v. *Distelrath*, 195 F.3d 531 (9th Cir. 1999), Hadfield claims a split in authority between the Ninth and First Circuits. However, *Honey* does not support Hadfield's claim that a split of authority exists, as the Ninth Circuit also agrees with the First Circuit that conduct in violation of state law or established procedures is random and unauthorized for purposes of *Parratt-Hudson*. Hadfield cites *Honey*, and only *Honey*, for the proposition that in the Ninth Circuit, "even acts in violation of established law may not be considered 'authorized'." *Id.* at 534. However, Hadfield both ignores more recent Ninth Circuit case law indicating

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[20] *See also Looby* v. *City of Hartford*, 152 F.Supp.2d 181, 188-89 (D. Conn. 2001) (holding that fire chief was not final policymaker as to personnel issues).

that a violation of established law is "random and unauthorized," and misinterprets the meaning of *Honey* itself.

According to the Ninth Circuit in *Corcoran* v. *Olson*, 102 Fed. Appx. 522, 523-24 (9th Cir. 2004) (unpublished),

> *A state official's failure to abide by constitutionally adequate procedures does not, under the circumstances of this case, give rise to a cause of action under §1983 for violation of procedural due process if a meaningful post-deprivation remedy is available.*
>
> Since Corcoran does not argue that the state's procedures are themselves inadequate, Corcoran's remedy is to seek relief under state law. . . .

(Emphasis added.) In like manner, the Ninth Circuit Court said in *Sorrels* v. *McKee*, 290 F.3d 965, 972 (2002):

> It was not the prison's rejection of the publication that makes out a procedural due process claim; it is the *lack of notice* of that rejection under *Procunier*. *Only if the failure to provide notice was pursuant to prison policy does this constitute a due process violation* actionable under § 1983. There is no evidence that this failure was anything other than a random mistake. Defendants maintain that the lack of notice was "a rare and inadvertent action," and Sorrels admits that he *does not "allege or present any evidence that there is a widespread refusal or a custom or practice* not to issue mail rejections."

(Emphasis added.)[21] Thus, there is no question, based on its decisions before and after *Honey* that the Ninth Circuit

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[21] *See also Williams* v. *Norton*, 185 F.3d 872, 1999 WL 386955, *1 (9th Cir. March 11, 1999) (unpublished); *Hodgson* v. *Waters*, 958 F.2d 377, 1992 WL 55856, *2 (9th Cir. March 23, 1992) (unpublished); *Burson* v. *State of Nevada Dept. of Human Resources*, 42 F.3d 1398,

(Continued on following page)

applies the same *Parratt-Hudson* rules as do the First and other circuits.

Nor does the Ninth Circuit's decision in *Honey* support Hadfield's claim that a split of authority exists. The *Honey* Court declined to apply *Parratt-Hudson* because the conduct complained of was alleged to be "in accordance with the policies, practices and customs of" the defendant police department and ci[illegible]and to have formed a pattern, all of which the court regarded as evidence that the acts were "deliberate, considered, [and] planned" so as to fall outside the application of *Parratt*. 195 F.3d at 534. Although the *Honey* court did say that "even acts in violation of established law may be considered 'authorized'," it meant only that when conduct is in accordance with *de facto* policies, practices or customs, it is not random or unauthorized even if those policies, practices or customs are contrary to state law.[22]

1994 WL 681051, *2 (Dec. 6, 1994) (unpublished); *Raditch* v. *United States*, 929 F.2d 478, 480 (9th Cir. 1991) ("intentional deprivation of a property right by a government official, in violation of established procedure, is a random and unauthorized act that cannot be prevented by predeprivation process").

[22] As support for its decision, the *Honey* court cited other cases in which the conduct at issue was pursuant to policy or custom even if contrary to law: *Piatt* v. *MacDougall*, 773 F.2d 1032, 1034, 1036 (9th Cir. 1985) (conduct of prison officials in denying prisoner payment for work performed was not random and unauthorized because it was part of a "consistent policy" toward all inmates and was "routine"); *Haygood* v. *Younger*, 769 F.2d 1350, 1358 (9th Cir. 1985) (conduct of state officials in wrongfully extending prisoner's confinement was not random and unauthorized, even though illegal, because it was done "through established interpretations of the regulations" and was "de facto government policy"); *Armendariz* v. *Penman*, 31 F.3d 860, 863 (9th Cir. 1994) (conduct complained of was in accordance with city policy to engage in a series of "sweeps" to close down low income housing units and expel gang members from the city).

Neither *Honey* nor the cases it cites bear any resemblance to the present case. There is no evidence in the record in the present case that there had been an established formal or informal state, county or PCSD procedure, policy or custom of denying a pre-termination hearing to a PCSD employee entitled to the protection of Massachusetts G.L. c. 35, § 51. In the present case, Sheriff McDonough is not alleged to have acted pursuant to any established procedure or *de facto* policy, but in a single incident as an act of political retribution.

As the forgoing analysis indicates, the Ninth Circuit would find that the conduct complained of in this case is random and unauthorized, consistent with the First Circuit's decision in this case.

2.4 The Fourth Circuit.

Hadfield cites *Plumer* v. *State of Maryland*, 915 F.2d 927 (1990), and *Fields* v. *Durham*, 909 F.2d 94 (1990), in support of his claim that the Fourth Circuit is in conflict with the First Circuit on the application of *Parratt-Hudson*. Hadfield contends that in the Fourth Circuit an official's conduct in violation of established state law is not "random and unauthorized" for purposes of the *Parratt-Hudson* analysis. However, Hadfield fails to refer this Court to *Bogart* v. *Chapell*, 396 F.3d 548 (2005), the most recent decision of the Fourth Circuit on this issue, and one in which that court makes absolutely clear that it regards conduct in violation of established state law as random and unauthorized.

In *Bogart*, an animal owner of numerous dogs and cats, brought a § 1983 action against the county and certain of its officials and employees who, after receiving complaints about maltreatment of the animals and arresting her, had seized the animals and immediately euthanized almost all

of them, in violation of a South Carolina statute which required officials who seize animals to care for them pending the outcome of civil or criminal court proceedings. *Id.* at 554 n. 3. The district court dismissed Bogart's procedural due process claim, ruling that the conduct of the officers responsible for euthanizing the animals was random and unauthorized because it violated nondiscretionary procedures set forth in the South Carolina statute.

After recognizing *Plumer* and *Fields*, the Fourth Circuit affirmed. The court rejected Bogart's assertion that her due process claim was saved by *Zinermon*, noting that, unlike the broad delegation of authority to the hospital staff in *Zinermon*,

> [t]he South Carolina code prescribed precisely how the Defendants were to act once they seized Bogart's dogs and cats. . . .

Id. at 561. Therefore, because the defendants "lacked authority to destroy the animals immediately upon their seizure . . . the state could not predict this deprivation." *Id.*

While in *Zinermon*, if the state had provided more guidance and delegated less discretion to the hospital staff, the deprivation might have been avoided, the *Bogart* court said that in the case before it the state had given the defendant officers no discretion. The court likened the case before it to *Hudson* where the deprivation was intentional and no amount of predeprivation process would have avoided the deprivation. *Id.* at 562.

If, as Hadfield claims, the decisions in *Plumer* and *Fields* stand for a rule in the Fourth Circuit that conduct in violation of established state procedures is not random and

unauthorized, a debatable proposition in the first place,[23] *Bogart*, decided 15 years later, clearly rejects that rule and brings the Fourth Circuit in line with the First Circuit and the others. Nothing makes this more clear than the language of the dissent in *Bogart* (Williams, J.), who identified two possible approaches to "random and unauthorized" under *Parratt-Hudson*: the "legalist" approach under which conduct is deemed random and unauthorized, precluding § 1983 liability, if such conduct violates state law, and the "governmental" approach under which even conduct in violation of state law can give rise to government liability. *Id.* at 564. According to Judge Williams, *Plumer* and *Fields* adopted the governmental approach but the *Bogart* majority abandoned that approach in favor of the legalist approach under which conduct in violation of state law is deemed random and unauthorized. *Id.* at 566.

Thus, *Bogart* establishes that, under Fourth Circuit law, conduct in violation of established state procedures is deemed to be random and unauthorized; and proves that there is no conflict between the First Circuit and the Ninth on the application of the *Parratt-Hudson* doctrine to the facts of this case.

As the foregoing analysis establishes, there is no split of authority among the circuits regarding any issue relevant to the application of the *Parratt-Hudson* doctrine to this case.

---

[23] Both the *Plumer* and *Fields* courts ruled that the plaintiffs' § 1983 procedural due process claims failed because adequate predeprivation process had in fact been given. Thus, those courts did not need to apply *Parratt-Hudson* and any other views expressed in those cases are *dicta*.

3. Massachusetts G.L. c. 35, § 51 provides an adequate post-deprivation remedy.

The Commonwealth of Massachusetts provided Hadfield an adequate post-deprivation remedy through Massachusetts G.L. c. 35, § 51 and judicial review by the Massachusetts courts. The Massachusetts Appeals Court held in *Puorro* v. *Comm.*, 59 Mass. App. Ct. 61, 794 N.E.2d 624 (2003), that an employee denied the pre-termination process required by § 51 has a right to use the appeal procedures set forth in § 51 to challenge the denial. The fact that Hadfield chose not to pursue this remedy is immaterial.

In his Petition, Hadfield claims that his post-deprivation remedy under § 51 is inadequate because he would "face the prospect of months or years of litigation to secure a post-termination remedy in state court," citing Bureau of Labor Statistics data, Petition at p. 28, which he claims indicates that the average employment litigation in a "sample of state courts" lasts 20.2 months. There is no merit to this claim.

First, recently enacted time standards for the Massachusetts state District Court, which would hear Hadfield's appeal under G.L. c. 35, § 51, require that court to render a decision within four months of filing, certainly not a long delay. District Court Standing Order 2-04, Part II and appendix.[24] The enactment of these standards is a clear indication that the Massachusetts state court system is capable of hearing such claims promptly.

Although this Court has recognized that "at some point, a delay in the post-termination hearing would

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[24] Resp. App. 8.

become a constitutional violation," *Loudermill*, 470 U.S. at 547, normal delays associated with litigation in the court system are not the kind of delay which renders a post-deprivation remedy inadequate. In fact, the *Loudermill* Court held that a nine month delay in providing a hearing did not work a denial of due process, while other federal courts have held that delays of two years did not violate due process.[25]

In *Easter House* v. *Felder*, 910 F.2d at 1406, the Court of Appeals for the Seventh Circuit, noting that "almost all litigation, whether conducted in a state or federal forum, may be characterized as a lengthy and speculative process," stated:

> [W]e . . . reject [the] characterization of the state recovery process as a "lengthy and speculative process" which forecloses the application of *Parratt*. In *Hudson*, the Supreme Court rejected an argument that state law relief should be deemed inadequate because it "is far from certain and complete." 468 U.S. at 535, 104 S.Ct. at 3205. . . .
>
> * * *
>
> [W]e should not reject the application of *Parratt* unless the remedy which an injured party may pursue in state court can readily be characterized as inadequate to the point that it is meaningless or nonexistent and, thus, in no way can

[25] *Matthews* v. *Eldridge*, 424 U.S. 319, 342 (1976) (11 month delay); *Isaacs* v. *Bowen*, 865 F.2d 468, 477 (2d Cir. 1989) (19 months; *Ritter* v. *Cohen*, 797 F.2d 119, 124 (3d Cir. 1986) (20 months); *Givens* v. *United States Railroad Retirement Bd.*, 720 F.2d 196, 201 (D.C. Cir. 1983) (19 months); *Frock* v. *United States Railroad Retirement Bd.*, 685 F.2d 1041, 1047 (7th Cir. 1982) (two years).

be said to provide the due process relief guaranteed by the Fourteenth Amendment.[28]

In any event, if the *Parratt-Hudson* doctrine did not bar his procedural due process claim, Hadfield would be left with pursuing his § 1983 in the federal courts, which, as noted in *Easter House*, is a lengthy process in itself.

CONCLUSION

For the foregoing reasons, the Writ should be denied.

Respectfully submitted,

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[28] *See also Hartwick* v. *Board of Trustees of Johnson County Community College*, 782 F.Supp. 1507, 1515 (D. Kan. 1992).

APPENDIX

Amendment 14 to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or

rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Massachusetts G.L. c. 35, § 51

The board shall (*a*) pass upon and finally adopt and put into effect, with such modifications, changes and additions as it shall deem proper, the classification and compensation plans and rules for their administration proposed by the director of accounts under section fifty; (*b*) pass upon, finally adopt and put into effect, with such modifications as it may deem proper, amendments to the classification and compensation plans and the rules for their administration as may be proposed from time to time under the provisions of section fifty or fifty-three; provided, that no such amendment not proposed by the director of accounts under section fifty shall be adopted except after a report which shall be made by said director within thirty days after submission to him; and provided, further, that an amendment proposed under section fifty-three and adopted by the board shall be effective only in the county whose county commissioners have proposed the amendment unless the county commissioners of four or more counties have joined in the proposal in which case it shall be effective in all counties, other than Suffolk and such other counties, if any, as shall under section fifty-six have ceased to be represented in the board; (*c*) pass upon and finally determine appeals relative to classification, as provided in section fifty-two; and (*d*) perform such other functions and duties as may be imposed upon it by sections forty-eight to fifty-five, inclusive.

The board is hereby authorized and directed to establish and administer uniform rules and regulations governing leaves of absence, shift differentials and overtime for officers and employees subject to section forty-eight to fifty-six, inclusive.

Any employee subject to sections forty-eight to fifty-six, inclusive, except superintendent and assistant

superintendent of hospital, the chief of medical staff and the administrator at the Barnstable county hospital, superintendent and assistant superintendent of training school, superintendent and assistant superintendent of buildings, superintendent of industrial farm, superintendent of state reservation, director of agricultural school, director of extension service, master and keeper and assistant master and keeper of jail and house of correction, assistant registers of deeds, county health officer, county engineer and county dog officer, who has completed at least five years of service may not be discharged from such employment except for just cause and for reasons specifically given him in writing by the appointing authority. Before any such discharge is effected, the employee shall be given a full hearing before the appointing authority, of which hearing he shall have at least three days' written notice, exclusive of Sundays and holidays, from the appointing authority. Within two days, exclusive of Sundays and holidays, after completion of said hearing, the appointing authority shall give the employee affected a written notice of his decision, stating fully and specifically the reasons therefor.

If within five days after receiving written notice of the decision of the appointing authority, the person so discharged shall so request in writing, he shall be given a hearing before the board. Said hearing shall be commenced in not less than three nor more than ten days, and shall be completed within thirty days after the filing of such request. The decision of the board shall be in writing and notice thereof shall be sent to all parties concerned within ten days after completion of the hearing. If the board finds that the action of the appointing authority was justified, such action shall be affirmed; otherwise, it shall be reversed and the person concerned shall be returned to his office or position without loss of compensation.

Within thirty days after action by the board on such a hearing, the person who was discharged may, if said action was affirmed by the board, bring a petition in the district court within the judicial district of which such person resides, addressed to the justice of the court, praying that the action of the appointing authority and of the board in discharging him may be reviewed by the court, and, after such notice to the appointing authority and the board as the court deems necessary, it shall hear witnesses, review such action, and determine whether or not upon all the evidence such action was justified. If the court finds that such action was justified the action of the appointing authority and of the board shall be affirmed; otherwise they shall be reversed and the petitioner shall be reinstated in his office or position without loss of compensation. The decision of the court shall be final and conclusive upon the parties.

Massachusetts G.L. c. 126, § 8A

The chief administrative officer of a house of correction shall be the superintendent. The superintendent, and any deputy superintendents, shall be appointed by the sheriff, or in the case of Suffolk county, by the penal commissioner of the city of Boston, and shall serve at his pleasure, and shall not be subject to the provisions of sections nine A and nine B of chapter thirty, or chapter thirty-one.

MASSACHUSETTS STANDING ORDERS OF THE DISTRICT COURT

JOINT STANDING ORDER 2-04. TIME STANDARDS FOR CIVIL CASES

I. INTRODUCTION

These time standards are promulgated to provide judges and clerk-magistrates with specific maximum time periods within which civil cases (1) should progress between court events and (2) should be disposed. The purpose of these time standards is to promote timely disposition of civil cases and to provide a basis for assessing the movement of civil cases from commencement to disposition in each division of the two departments in which they apply.

The time standards are divided into three categories, each comprised of specific types of civil actions ("casetypes") and each governed by a specific standard for a maximum time to disposition.

In general, these three time standard categories reflect the complexity (or potential complexity) of the casetypes each includes, with the least complex in Category A, the more complex in Category B, and the most complex (or potentially complex) in Category C.

The casetypes in Category A consist mainly of actions that by law must be disposed well within the two-month maximum. For these cases the time standard will provide a basis for periodically confirming that no cases are unaccounted for or overlooked.

Two casetypes in Category B, summary process and small claims, have "staircased" time standards to reflect the fact that significant numbers of these cases should be

disposed well before their overall maximum time to disposition.

Category C, which consists of tort and contract actions, also has "staircased" time standards to reflect the fact that most of these cases should be disposed well before the overall maximum time limit.

II. THE TIME STANDARDS

CATEGORY A – Time to Disposition: Upon Filing or Not More Than 2 months from commencement

- Domestic Violence Restraining Orders
- Actions for Equitable Relief for Residential Lock-Outs and Utility Shut-Offs
- Mental Health Proceedings
- Applications for Marriage Age and Time Waivers
- Actions to Enforce Sanitary Code

CATEGORY B – Time to Disposition: Not More Than 4 months from commencement

- Summary Process: 50% NMT 1 month; 90% NMT 2 months; 100% NMT 4 months
- Small claims: 75% NMT 2 months; 100% NMT 4 months.*
- Civil Motor Vehicle Infractions*
- Supplementary Process
- Judicial Review of Administrative Decisions**

- Other Specialized District Court and Boston Municipal Court Actions**

* 5 months if de novo appeal is claimed

** See attached list

CATEGORY C – Tort and Contract Actions

C-1 75% of Total Dispositions	Time to Disposition: Not More Than 6 months from commencement • Cases dismissed for plaintiff's failure to make timely service • Cases disposed by default judgment • Cases disposed by voluntary dismissal, agreement for judgment or other consensual disposition
C-2 20% of Total Dispositions	Time to Disposition: Not More Than 12 months from commencement • Cases disposed by bench trial Dispositions • Cases disposed by voluntary dismissal, agreement for judgment or other consensual disposition • Cases dismissed for plaintiff's failure to seek default judgment
C-3 5% of Total Dispositions	Time to Disposition: Not More Than 24 months from commencement • Cases disposed by jury trial • Cases disposed by bench trial after having been scheduled for jury trial

- Cases disposed by voluntary dismissal, agreement for judgment or other consensual disposition after having been scheduled for trial

Maximum Intervals Between Court Events:

- From Answer to Case Management Conference Date: Not More Than 4 Months
- From Case Management Conference to Pretrial Conference Date: Not More Than 7 Months
- From Pretrial Conference to Trial: Not More Than 3 Months

/s/ CHARLES R. JOHNSON
Charles R. Johnson,
Chief Justice Boston Municipal Court Department

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Lynda M. Connolly,
Chief Justice District Court Department

Promulgated:
Effective:

APPENDIX

Category B – Boston Municipal Court and District Court Actions for Judicial Review of Administrative Agency Decisions

- Abandoned property appeals
- Unemployment compensation appeals
- Motor vehicle insurance property appeals
- Firearms license denied appeals

- County Personnel Board and involuntary retirement appeals
- Zoning appeals
- Dog order appeals
- Arbitration appeals regarding residential repair contracts
- Appeals from Historic District Commission decisions
- Civil service retirement appeals
- Appeals from Funeral Directors' Board of Registration decisions
- Review of decisions of Massachusetts Commission Against Discrimination
- Review of certain Board of Health abatement orders

Category B – Other Boston Municipal Court and District Court Civil Actions

- Actions to enforce certain real estate liens
- Replevin
- Garage and automobile liens
- Repossession
- Actions to assess support against kindred of persons in need
- Actions by jurors against employers who fail to compensate employees who perform jury service
- Actions seeking a decree of forfeiture and sale with regard to property seized by law enforcement personnel because of an offense

- Hearings at the request of a municipal tax collector on a taxpayer's ability to pay a tax
- Applications for waiver of the three-day period prior to issuance of marriage license
- Applications by minors for authorization to marry
- Actions to enforce the state sanitary code
- Actions by the Commissioner of Medical Assistance seeking entry of judgment regarding overpayments made to a provider of medical care under G.L. c. 118E
- Forfeiture proceedings regarding certain explosives and flammable substances
- Proceedings to compel testimony before the State Fire Marshal
- Orders by a District Court to expunge certain entries in the records of the Department of Probation and the Criminal History Systems Board
- Proceedings for violations of certain municipal ordinances or by-laws that are treated as civil infractions
- Actions to enforce discovery in cases pending in other states; and
- Actions regarding condominium conversions

Adopted effective November 1, 2004.

OCT 14 PAGE 1

Supreme Court, U.S.
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No. 05-214

IN THE

Supreme Court of the United States

Russell J. Hadfield,

Petitioner,

v.

Joseph McDonough, in his individual and official capacity as Sheriff of Plymouth County, Massachusetts, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), this Court held that the Due Process Clause requires a pre-termination hearing before a tenured public employee may be deprived of his property interest in his job. Relying on the so-called "*Parratt-Hudson*" doctrine, the First Circuit holds that a pre-termination hearing is *not* actually required, and that a post-deprivation remedy will suffice, so long as the denial of the pre-termination hearing also violates state law. Pet. App. 13a-14a. Respondents agree that this incongruous rule is, in fact, the law of the First and Seventh Circuits. See BIO 15 & n.15. Moreover, respondents do not dispute that decisions from the Second, Fourth, Fifth, and Ninth Circuits have squarely refused to apply that rule when presented with cases in which tenured employees were denied pre-termination hearings in violation of state law. Respondents also do not contest that the question presented is recurring and important. Nor have they identified any vehicle problems that would prevent the Court from resolving the circuit split in this case.

Instead, respondents' principal argument against certiorari is that the decisions petitioner cited as conflicting with the First Circuit rule no longer represent the law of their respective circuits. As discussed below, that assertion is unfounded. Respondents point to no intervening decisions of this Court or the courts of appeals sitting en banc overruling, or even undermining, the on-point decisions cited by petitioner. Rather, respondents rely on cases (some not even precedential) addressing due process challenges in other, inapposite contexts. The difference in outcome in these cases does not, as respondents allege, demonstrate that the circuits have abandoned their prior employment cases. Indeed, the decisions respondents cite do not purport to, and could not, overrule the prior on-point circuit precedent. At the same time, as shown below, there are numerous recent cases outside the employment context in which courts have refused

to hold that conduct which violated state law was therefore "random and unauthorized" under *Parratt-Hudson*. Thus, at most, respondents' cases illustrate petitioner's point (Pet. 14-15) that there is a broad confusion in the circuits about the proper scope and application of *Parratt-Hudson*. That is a reason to grant the petition, not a reason to deny it.

1. Respondents have done nothing to undermine petitioner's demonstration (Pet. 9-15) of the deep and entrenched circuit split over whether the failure to provide a pre-termination hearing violates the Due Process Clause when the hearing was also required by state law and state law provides a post-termination remedy

a. Fourth Circuit. Respondents do not dispute that the decision below is in direct conflict with *Fields* v. *Durham*, 909 F.2d 94 (CA4 1990). Relying on settled circuit precedent, the First Circuit held below that "a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law." Pet. App. 13a (citations omitted). The Fourth Circuit reached the same conclusion in the initial appeal in *Fields*. See 909 F.2d at 96. However, when ordered by this Court to reconsider its decision in light of *Zinermon* v. *Burch*, 494 U.S. 113 (1990), the Fourth Circuit reversed course and concluded that the denial of a pre-termination hearing violates the Due Process Clause even if the denial also violates state law. 909 F.2d at 96-98. *Zinermon*, the Fourth Circuit concluded, reaffirmed that *Loudermill*, not *Parratt-Hudson*, established "the proper standard by which to judge the adequacy of the process afforded." *Id.* at 97 (citation omitted).

Respondents do not dispute that petitioner's due process claim would succeed under *Fields*, but rather argue that the Fourth Circuit abrogated *Fields* in *Bogart* v. *Chapell*, 396 F.3d 548 (2005). See BIO 25-27. This argument fails. In *Bogart*, the police seized more than two hundred of the plaintiff's cats and dogs. Although they were required to care

for the animals under state law, the police instead had the animals euthanized. The court held the subsequent due process claim barred by *Parratt-Hudson*. Respondents argue that in so doing, the court necessarily overruled *Fields*, pointing to the *Bogart* dissent. BIO 27. Respondents conspicuously omit, however, that the *Bogart majority* specifically distinguished *Fields*, explaining that while the officers in the case before it were entirely without authority to destroy the animals, in "*Fields*, the state actors (like those in *Zinermon*) were empowered by the State with the authority to effect the deprivations at issue [*i.e.*, the job termination] and the duty to provide the plaintiffs with predeprivation procedural safeguards." *Bogart*, 396 F.3d at 560 n.11. Petitioner's case, of course, would be controlled by the rule of *Fields*, not *Bogart*, as the *Fields* decision directly addresses the question presented here. But even under *Bogart*, the *Parratt-Hudson* doctrine would not apply because respondent McDonough had the power to fire petitioner and the duty to provide him with a pre-termination hearing. See *ibid.*

b. Fifth Circuit. Respondents make the same mistake in attempting to show that there is no division between the First and Fifth Circuits. Again, respondents do not contest that the decision below cannot be reconciled with *Findeisen* v. *North East Independent School District*, 749 F.2d 234 (CA5 1984). Instead, they argue that *Findeisen* was overruled *sub silentio* by a subsequent case having nothing to do with *Loudermill* or employment termination. See BIO 18-19. This time, respondents rely primarily on a case involving the revocation of a crop-dusting license. *See id.* 19 (citing *Johnson* v. *La. Dep't of Agric.*, 18 F.3d 318 (CA5 1994)). But *Johnson* is inapposite to termination questions, and the panel in that case had no authority to overrule *Findeisen*. In fact, *Johnson* did not even cite *Findeisen*, much less purport to overrule it.[1]

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[1] In any event, the panel in *Johnson* acknowledged that the proper construction of the *Parratt-Hudson* doctrine was not disputed in the case before it, as the plaintiff's only argument in

The same is true of the other cases cited in respondents' brief at footnote 16, none of which concern employment termination or discussed *Findeisen*. The decision in *Caine* v. *Hardy*, 943 F.2d 1406 (CA5 1991) (en banc), for example, did not disturb the court's prior employment termination law. *Caine* arose from the suspension of a doctor's clinical privileges at a hospital. The court's primary holding was that a formal pre-suspension hearing was unnecessary under ordinary due process balancing principles, in light of exigent circumstances (the death of a patient). *Id.* at 1412. The court also rejected the doctor's claim that a pre-suspension hearing was nonetheless required by *Zinermon*. *Id.* at 1413. In so doing, however, the court did not cast doubt on *Findeisen*, noting that *Zinermon* "requires a case-by-case analysis of the deprivation at issue." *Ibid.*

The Court returned to the due process rights of terminated public employees in *Coggin* v. *Longview Independent School District*, 337 F.3d 459 (CA5 2003) (en banc). In that case, a tenured teacher was fired without a pre-termination hearing even though state law clearly required one. *Id.* at 465-66. Rather than adopting respondents' view that the violation of state law made the denial "random and unauthorized," the en banc court held that the school board violated the teacher's due process rights. *Ibid.* The Fifth Circuit cited *Zinermon* for the proposition that under "well-established federal law, the constitutional minimums for due process require that the final decision maker must hear and consider the employee's story *before* deciding whether to discharge the employee." *Id.* at 465 (footnote omitted, emphasis added). While the extent to which the parties addressed the application of *Parratt-Hudson* is unclear, the decision in *Coggin*, and especially the citation to *Zinermon*,

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support of his due process claim was that "an earlier opinion in this case established a violation of due process" and therefore established "law of the case." 18 F.3d at 321.

would be difficult to explain had the Fifth Circuit overruled *Findeisen* in *Johnson* or *Caine*.

c. Ninth Circuit. Following the same pattern, respondents do not dispute that in *Honey* v. *Distelrath*, 195 F.3d 531, 533-34 (CA9 1999), the Ninth Circuit rejected the claim that the denial of an adequate pre-termination hearing was "random and unauthorized" simply because the denial also violated state law. Instead, respondents argue that *Honey* no longer represents the law of the Ninth Circuit and that even if it did, it would not apply to petitioner's claim in this case. Both assertions are incorrect.

First, in arguing that the law of the circuit has changed since *Honey*, respondents are again unable to point to any case in the relevant context of employment, much less any case purporting to overrule *Honey* or modify its holding. Instead, respondents again rely on inapposite decisions in other contexts by panels that lacked the authority to overrule *Honey*; in fact, many of the decision lack any precedential authority at all. See BIO 23 & n.21 (four out of six cases cited unpublished); 9th Cir. R. 36-3. Respondents cannot plausibly claim that a court deciding petitioner's case in the Ninth Circuit would have disregarded the on-point binding decision in *Honey* in favor of a non-precedential decision arising in a different context.

Respondents also argue that the petition mischaracterizes the holding of *Honey*. The Ninth Circuit, respondents claim, applies the same rule as the First, with a narrow exception created in *Honey* for denials of due process that are part of a "*de facto*" policy or practice. BIO 24. This is incorrect. The court in *Honey* provided two alternative grounds for its decision. First, the Court rejected the defendants' claim that *Parratt-Hudson* applied because "the deprivation resulted from actions that were in violation of established law," 195 F.3d at 534: "We hold that the acts at issue in this case were not random and unauthorized because the defendants in this case had the authority to effect the very deprivation

complained of, and the duty to afford Honey procedural due process." *Ibid.* Thus, the Court held, contrary to the view of the First Circuit, "even acts in violation of established law may be considered 'authorized.'" *Ibid.*

The opinion in *Honey* then proceeded to provide a second reason for denying the *Parratt-Hudson* defense in the case before it: "*Additionally*, this circuit does not apply *Parratt* where a deprivation occurs because officials are acting according to established procedures – even if those established procedures violate other state or federal laws." 195 F.3d at 534 (emphasis added). That additional reason for rejecting the defendants' *Parratt-Hudson* defense was, by its plain terms, an alternative holding. And in the Ninth Circuit, the law is clear that *both* alternative holdings are law of the circuit. See, *e.g.*, *Operating Engineers Pension Trust* v. *Charles Minor Equip. Rental, Inc.*, 778 F.2d 538 (CA9 1985). Accordingly, as the First Circuit itself recognized (see Pet. App. 14a n.6), the decision below conflicts with the Ninth Circuit's decision in *Honey*.

d. Second Circuit. Respondents argue that there is no split of authority between the First and Second Circuits because the Second Circuit's decision in *Dwyer* v. *Regan*, 777 F.2d 825 (1985), does no more than recognize "a special exception to the *Parratt-Hudson* doctrine and holds that conduct that otherwise could be considered random and unauthorized, including conduct in violation of established state law, is not random and unauthorized if the actor is a 'high-ranking official having final authority over the decision-making process.'" BIO 20 (quoting *Dwyer*, 777 F.2d at 832).

As an initial matter, respondents cannot and do not claim that this rule is consistent with the law of the First Circuit, which makes no exception for deprivations effected by "high-ranking officials." See Pet. App. 13a-15a; see also *Easter House* v. *Felder*, 910 F.2d 1387, 1402-03 (CA7 1990) (en banc) (rejecting *Dwyer*'s "high-ranking official" rule).

Respondents claim only that this circuit conflict is not implicated in this case because, they assert, the Sheriff would not be considered a "high-ranking official" under *Dwyer*. That assertion is unfounded.

Respondents argue that Sheriff McDonough does not qualify as a "high-ranking official" because his "hiring and firing decisions are constrained by state law such as" the statute that required him to provide petitioner a pre-termination hearing. BIO 21. But the same was true of the "high-ranking official" in *Dwyer*. See 777 F.2d at 831 (defendant's ability to terminate plaintiff constrained by N.Y. Civ. Serv. Law 75(1), which requires a pre-termination hearing); see also *Burtnieks* v. *City of New York*, 716 F.2d 982, 988 (CA2 1983) (*Parratt-Hudson* inapplicable to claim against high-ranking officials who were required by city ordinances to provide a pre-deprivation hearing).

Respondents further claim that the Sheriff was not a "high-ranking official" under *Dwyer* because his termination decisions were subject to review by the County Commission. BIO 21. But even if the possibility of such review made the Commission rather than the Sheriff the final decisionmaker, that would simply mean that the respondent Commissioners in this case are "high-ranking officials" under *Dwyer* even if the Sheriff is not. See *RR Village Assoc., Inc.* v. *Denver Sewer Corp.*, 826 F.2d 1197 (CA2 1987) (*Dwyer* applied to actions of a town council).[2]

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[2] Respondents point out that the Commissioners refused to exercise any control over the Sheriff's termination decision in this case, thinking that petitioner was not tenured. BIO 21 n.19. For the purposes of its decision, the First Circuit assumed that this conclusion was wrong. Pet. App. 12a-13a. Accordingly, as the case is presented to this Court, the Commissioners had the authority and responsibility to ensure that petitioner was provided a pre-termination hearing and, as a result, would be considered a "high-ranking officials" under *Dwyer*.

In any case, the Second Circuit has not limited *Dwyer* to officials with unreviewable authority. For example, in *Velez* v. *Levy*, 401 F.3d 75 (CA2 2005), the Second Circuit recently held *Parratt-Hudson* inapplicable in a case in which the Chancellor of the New York City school system removed a local school board member. Although that removal decision was subject to review by the City School Board, *id.* at 81, the Second Circuit nonetheless found that the Chancellor was a "high-ranking official" within the meaning of *Dwyer*. *Id.* at 92. It was enough, the court held, that the official "had the authority to remove [the plaintiff], and the duty as Chancellor to follow the governing New York statutes and regulations" that required a pre-termination hearing. *Ibid.*; see also *DiBlasio* v. *Novello*, 344 F.3d 292, 303 (CA2 2003). The same is true in this case – the Sheriff had both the authority to terminate petitioner and the responsibility to provide a pre-termination hearing. See *Clow* v. *Deily*, 953 F. Supp. 446, 453 (N.D.N.Y. 1997) (Commissioner of Police had "final authority over the decision to terminate Plaintiff from her position as a police officer" and therefore his acts were did not fall within the rule of *Parratt*).

The divergence between the rules of the First and Second Circuits is thus squarely presented in this case.

3. As shown above, the division cited in the petition is real and continuing. Indeed, even in respondents' view, the courts of appeals currently apply at least three different rules in evaluating claims under *Loudermill*: (a) some courts, including the First and Seventh Circuits, hold that *all* violations of state law are "random and unauthorized" (BIO 15 & n.15); (b) the Second Circuit has created an exception for the acts of "high-ranking officials" (BIO 20); and (c) the Ninth Circuit permits suits alleging deprivations that violate state law but are pursuant to a *de facto* policy (BIO 24). Even if that were a complete and accurate description of the state of the law (which it is not), certiorari would still be warranted to resolve this three-way conflict.